



STATE ETHICS COMMISSION BULLETIN

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Commission Issues Advisories on Abutters, Competitors and Elected Officials Voting on Budgets

The State Ethics Commission recently approved three updated educational advisories providing guidance to the public officials.

As discussed in [Advisory No. 05-02: Voting on Matters Affecting Abutting or Nearby Property](#), a property owner is presumed to have a financial interest in matters affecting abutting and nearby property. Unless a public employee can clearly demonstrate that he does not have a financial interest, he should not take any action in his official capacity on matters affecting property that is near or directly abuts his own property. The same rule applies to property owned by a business partner; property owned by any immediate family members; property owned by a private employer, or prospective employer; or property owned by any organization in which the public employee is an officer, director, partner or trustee.

In situations where an elected public employee's family members are employed by the same city, town or agency, the employee may not par-

ticipate in any discussion or vote on any budget item that would affect the family member's salary or sign a payroll warrant that includes the family member's pay. For further information, see [Advisory No. 05-03: Elected Officials Voting on Budgets and Signing Payroll Warrants that Include Salaries for Family Members](#).

As outlined in [Advisory No. 05-04: Voting on Matters Involving Competitors](#), a public employee may not participate in particular matters if they also affect the public employee's financial interests. There is no one easy "rule" for a public employee to rely upon when deciding who competitors are and whether the competitors' particular matters will also affect the public employee's financial interest.

The Commission continues to update its educational materials available at www.mass.gov/ethics/educationalmaterials.html. Persons with questions about a specific situation should contact the Ethics Commission at 617-727-0060.

SJC Rules on Commission's Authority to Issue Summonses

In a May 2005 decision, the Massachusetts Supreme Judicial Court (SJC) unanimously affirmed that the State Ethics Commission has the authority to issue a summons during the preliminary inquiry stage of an investigation.

In *John Doe v. State Ethics Commission*, the Commission voted in 2003 to initiate a preliminary inquiry into allegations of violations of the conflict of interest and financial disclosure laws. The plaintiff did not comply with a summons seeking his testimony and filed a motion to quash the summons on the ground that the commission lacked the statutory authority to issue it. In response, the Commission sought an order compelling the plaintiff to comply with the summons. A Superior Court judge allowed the Commission's motion to compel the plaintiff's testimony. The plaintiff appealed from the Superior Court judgment and the SJC granted direct appellate review. The full text of the SJC's opinion may be found at www.masslaw.com/signup/opinion.cfm?recID=116619.

Ethics Primer: State Officials Appearing Before State Boards and Agencies

Periodically, the Bulletin will discuss a particular area of the conflict of interest law. The information provided is educational in nature and should not be considered legal advice. Persons with questions about a specific situation should contact the Ethics Commission for free confidential advice.

Massachusetts General Laws c. 268A, the state's conflict of interest law, governs the conduct of state officials. In general, § 4 of the conflict

law prohibits a state official from acting as an agent for anyone other than the state in connection with any matter in which the state is a party or has a direct and substantial interest even if the state official abstains from taking any official action on this matter. It also prohibits a state official from requesting or receiving compensa-

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From the Executive Director

"Legislature Funds Budget Increase"

The Commission reached a critical juncture in its ability to carry out its responsibilities in FY 05. Since 2001, budget cuts resulted in a reduction in Commission staff from 26 to 19. During this same period, the public's requests for advice increased by 11% and complaints increased by 22%.

Fortunately, the legislature approved a budget of \$1,415,000 for FY 06, an increase of 12% from the previous year's budget of \$1,265,221.

This increase will help the Commission to:

- respond promptly to the thousands of requests for advice from public employees,
- resolve in a more timely manner the hundreds of complaints that it reviews each year,
- fulfill its new mandate to create reasonable exemptions consistent with the conflict of interest law,
- provide 9 to 5 phone coverage and
- maintain its voluntary electronic filing system used by 70% of all SFI filers.

The FY06 budget increase will not address all of the Commission's current needs that were created in part by past budget cuts along with increased requests for services. For example, it is unlikely that the Commission will have to funds to reinstitute its municipal seminar program. The FY06 budget increase will, however, go a long way toward providing the Commission with an adequate level of resources.

The Commission appreciates the support of the Legislature and the Governor in recognizing the need for this modest budgetary expansion in order to allow the Commission to better fulfill its mission.

Peter Sturges

Commission Members Summer, 2005

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Editor

Ten Percent of Commonwealth's Communities Responsible for Forty Percent of Complaints to Commission *Commission Begins Outreach Campaign*

The Commission is conducting an outreach campaign to educate public officials, the media and the general public in the 40 municipalities in which ten or more complaints have been filed over a recent two year period.

Of the total number of complaints received (1431) during the period reviewed, 577 were from forty municipalities. Thus, 40% of the complaints come from 11% of the towns.

The Commission recognizes that a high number of complaints is not necessarily a good indicator of systemic problems in a community. For example, a community may have a larger number of complaints all related to the same

matter or may have a small faction of individuals who file a large number of complaints. The Commission believes, however, that these statistics suggest that these communities need further education about the conflict of interest law.

Six of the targeted municipalities have already hosted educational seminars and several others have scheduled seminars for the fall.

At the other end of the spectrum, 75% of the state's municipalities (262) had five or fewer complaints during the same period, including 61 with zero complaints.

For more information about sponsoring an educational seminar, contact the Commission at 617-727-0060.

Municipalities Advised to Review "Special Municipal Employee" Designations

In June 2005, the Commission sent a memorandum to each of the Commonwealth's 351 cities and towns seeking assistance in ensuring compliance with the conflict of interest law, particularly by those employees who may be designated as special municipal employees, many of whom face restrictions of which they may be unaware. In the memorandum, the Commission recommended that municipalities review their special municipal employee designations and return them to the Commission within 60 days.

The Commission continues to receive allegations of violations of the provisions of G.L. c. 268A, including §§17 and 20, which often turn on whether a municipal employee's position has been designated as a "special." For example, municipal employees generally may not represent special interests or private employers before town boards or have additional contracts with the municipality unless they are special municipal employees. Therefore, the Commission urged municipal leaders to make all employees aware of the conflict of interest law generally and

particularly these restrictions for their own protection.

Ultimately, it is the municipal employee not the municipality who risks prosecution for a violation of the conflict of interest law.

In the future, the Commission intends to intensify its prosecution of violations of these sections and may impose civil penalties of up to \$2,000 per violation, issue cease and desist orders, bring civil damages to recover damages or refer matters for criminal prosecution.

[Commission Summary 16: Special Municipal Employees](#) provides additional information about the application of the conflict of interest law to special municipal employees. Other information is available on the Commission's website at www.mass.gov/ethics.

In addition, the Commission provides to anyone who is covered by the conflict of interest law free, confidential legal advice about how the law applies to them in a prospective situation. For further information or assistance, please contact the Commission at 617-727-0060.

Recent Enforcement Matters

The Ethics Commission investigates numerous cases alleging violations of the conflict of interest and financial disclosure laws each year. While the Commission resolves most matters confidentially, it resolves certain cases publicly.

A decision and order concludes an adjudicatory proceeding or civil trial. The decision is a finding by the Commission that the law was or was not violated and the order determines the civil penalty or other remedy, if any. The Commission's decision may be appealed in Superior Court.

A disposition agreement is a voluntary written agreement entered into between the subject and the Commission in which the subject admits violating the law and agrees to pay a civil penalty. Disposition agreements are matters of public record once a case is concluded.

The Commission does not comment on any matter under investigation, nor does the office confirm or deny that it has received a specific complaint. The identity of any complainant is kept confidential.

Full texts of Decision and Orders and Disposition Agreements can be found on the Commission's website, www.mass.gov/ethics.

Decision and Order

In the Matter of Richard Kenney

The Commission issued a Decision and Order finding that Kingston Selectman Richard Kenney violated § 23(b)(3) of the state's conflict of interest law, G.L. c. 268A, by asking the Chief of Police to change a ticket for a Kingston resident whom Kenney knew and who was then a fellow Town board member. Kenney was ordered to pay a civil penalty of \$500.

A Kingston resident, who was at the time a member of the Silver Lake Regional School Committee, was stopped for not having a valid inspection sticker. He was not cited for the sticker infraction, but instead was given a \$25 ticket for not wearing his seat belt. At Town Meeting, Kenney told the Chief about the ticket and asked the Chief to change the ticket to a warning. The Chief told Kenney to have the resident call him the next day. The next morning, the resident contacted the Chief. He told the Chief that he had not asked Kenney to intervene on his behalf. The Chief explained the process for contesting the ticket; he did not change the ticket. At the continuation of the Town Meeting on May 8, 2001, Kenney

chastised the Chief for having the resident call him if he was not going to do anything about the ticket.

By asking the Chief to change a ticket to a warning for a fellow Town official that he knew and that he served with on several Town committees, Kenney violated § 23(b)(3). Kenney could have complied with §23(b)(3) of the conflict law by making a public written disclosure of the facts that would otherwise lead to such a conclusion. Kenney made no such disclosure.

In the Matter of Chanrithy Uong

The Commission issued a Decision and Order concluding the adjudicatory hearing of Lowell City Councilor Chanrithy Uong by finding that Uong violated M.G.L. c. 268A, the state's conflict of interest law. Uong was ordered to pay a civil penalty of \$6,000 and to cease and desist violating the law by relinquishing his Lowell High School (LHS) housemaster position within 30 days.

The Commission found that Uong violated § 20 by, while serving as a city councilor and a LHS guidance counselor, accepting appointment to the housemaster position. An exemption to this section of the law allowed Uong to continue to hold the position of guidance counselor at LHS after his election in 1999 to the city council. The exemption, however, prohibits a municipal employee who is elected to the city council from being eligible for appointment or re-appointment to a *new* position while he serves on the city council or for six months thereafter.

In April 2001, the Commission issued an opinion advising Uong that he could not relinquish his position as guidance counselor and accept a new position as an assistant principal or a principal while continuing to serve as a city councilor. Following the issuance of the opinion, Uong was advised that he could seek a legislative change or appeal the decision to the

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SECTION BY SECTION THE CONFLICT OF INTEREST LAW, G. L. c. 268A

- Section 4 of the conflict of interest law prohibits a state employee from receiving compensation from or acting on behalf of anyone other than the Commonwealth in connection with any matter in which the Commonwealth is a party or has a direct and substantial interest.
- Section 6 prohibits a state employee from participating in a particular matter in which he has a financial interest.
- Section 19 prohibits a municipal employee from officially participating in matters in which he has a financial interest.
- Section 20 of the conflict of interest law generally prohibits a municipal official from having a financial interest in a contract made by a municipal agency of the same city or town.
- Section 23(b)(2) prohibits a public employee from using his or her position to obtain for the employee or others an unwarranted privilege of substantial value not properly available to similarly situated individuals.
- Section 23(b)(3) of the conflict law prohibits a public official from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that anyone can improperly influence or unduly enjoy the public official's favor in the performance of his official duties. A public official can dispel the appearance of a conflict of interest by disclosing in writing to his appointing authority or, if no appointing authority exists, disclosing in a manner which is public in nature, the facts which would otherwise lead to such a conclusion.

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superior court. Uong did not pursue these options.

In March 2002, Uong applied for an LHS housemaster position. Uong won appointment and, in August 2002, began serving as housemaster with a starting salary of \$81,033, an increase of about \$21,000 over his guidance counselor salary. LHS does not have principals or assistant principals; the housemaster position is the high school equivalent of the position of assistant principal at the middle and elementary schools.

Disposition Agreements

In the Matter of Kevin F. Capalbo

The Commission fined Shrewsbury Planning Board Member Kevin F. Capalbo \$1,000 for participating in matters involving the Park Grove Farm subdivision at the same time that he was seeking \$500 from Robert Cole, one of the developers of the subdivision. Capalbo was seeking the \$500 for damage that Capalbo's wife's car had incurred while in a parking lot owned by Cole.

According to a Disposition Agreement, on October 3, 2002, Capalbo's wife's car hit a metal pipe in an unpaved parking lot owned by Cole. That evening Capalbo, who had not yet learned of the damage to his wife's car, voted to approve the Park Grove Farm subdivision, subject to 28 conditions. When Capalbo learned of the damage to the car, \$883.38, he sought from Cole reimbursement for the \$500 deductible of his insurance policy. Cole declined to pay the deductible and told Capalbo to sue him.

A few weeks after this conversation, when Capalbo called to discuss the issue further, Cole agreed to pay the \$500 deductible. Capalbo sought payment from Cole in a letter dated November 2, 2002. In the meantime, there had been a number of complaints from neighbors regarding the work being done at the subdivision. Capalbo

was aware of these complaints.

When Capalbo was unable to reach Cole by phone to inquire as to the payment status, Capalbo visited the Park Grove Farm subdivision to speak with Cole personally. Cole was not at the site. Capalbo asked the foreman to have Cole contact him.

Cole paid the \$500 deductible on November 19, 2002. According to Cole, he did so because he felt that Capalbo was linking his request for payment to his role as a Planning Board member overseeing the outstanding subdivision issues. Capalbo continued to participate as a Planning Board member in Cole's subdivision without disclosing his private dealings with Cole.

By continuing to participate as a Planning Board member in matters concerning the Park Grove Farm subdivision while seeking payment for damages to his wife's car from the subdivision developer, Capalbo violated § 23(b)(3). Capalbo could have complied with §23(b)(3) of the conflict law by making a public written disclosure of the facts that would otherwise lead to such a conclusion. Capalbo made no such disclosure.

In the Matter of Josef Fryer

Dover Municipal Well Inspector Josef Fryer paid a \$2,000 civil penalty to resolve allegations that he violated the state's conflict of interest law by inspecting wells of Dover Water Company customers. Fryer is a one-third owner, with his siblings, of Dover Water Company, a private family business that supplies water services.

According to a Disposition Agreement, Fryer conducted well inspections for an average of two Dover Water Company customers a year who had applied to the Dover Board of Health for permits to dig their own wells. If successful, the applicants would receive water from their own wells and would no longer do business with Dover Water Company. Fryer reviewed well applications, met with the driller to

make sure that the actual well placement matched the placement on the application and approved the well if it passed a test for water volume and quality.

By participating in well inspections that could result in Dover Water Company losing customers, Fryer participated in matters affecting his family business in violation of § 19.

In the Matter of Ruvane E. "Rip" Grossman

The Commission fined Ruvane E. "Rip" Grossman, a former consultant to the University of Massachusetts Medical School (UMMS), \$10,000 for violating the state's conflict of interest law. Grossman provided intellectual property consulting services to UMMS to help license technologies developed by UMMS. At the same time, he was also consulting for CytRx Corporation, a California intellectual property marketing firm. By bringing UMMS and CytRx together on the licensing matter while he was consulting for both of them, Grossman violated G.L. c. 268A, §§ 4 and 6.

Grossman brought UMMS and CytRx together to discuss marketing UMMS's ribonucleic acid interference (RNAi) technology. RNAi technology is an important life science and therapeutic technology. Grossman participated in the negotiation of a licensing agreement between UMMS and CytRx by attending meetings, making suggestions and discussing the relevant matters as both an agent for CytRx and as a UMMS consultant. At the time Grossman so participated, he had a consulting contract with UMMS for a maximum of \$84,000, in addition to a consulting contract with CytRx for \$5,000 a month and a "success fee" of at least \$150,000.

In April 2003, UMMS signed a licensing agreement with CytRx by which CytRx would market the RNAi technology and UMMS would receive \$200,000, 1.8 million shares in CytRx stock, royalty payments and other beneficial commitments from CytRx.

In May 2003, after senior UMMS

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officials learned of Grossman's dual role, UMMS reviewed the licensing agreement. UMMS determined that it would be advantageous to leave the licensing agreement in place but took additional actions including:

- terminating Grossman's relationship with UMMS;
- requiring that Grossman forfeit the success fee of \$53,000 and 100,000 shares of CytRx stock valued at \$240,000 as of October 2003, when the termination agreement was made; and
- setting restrictive terms under which CytRx could employ Grossman in the future, ensuring that Grossman would not receive his forfeited commission in the future, not have contact with UMMS about the licenses and not participate in the interpretation of the licenses.

In the Matter of Jacob Kulian

The Commission fined former Middleborough Assessor Jacob Kulian \$10,215 for violating the state's conflict of interest law, M.G.L. c. 268A, by taking actions that reduced his property taxes. The Commission received \$8,000 as a civil penalty; the remaining \$2,215 will be reimbursed to the Town of Middleborough for unpaid property tax abatements and reductions Kulian was not entitled to receive.

Kulian was an elected Assessor

between 1995 and April 2004. During that time, Kulian:

- directed the Assessor-Appraiser, an employee of the Board of Assessors, to reduce his property assessment in 1997 and 2000 resulting in reductions to his property tax bill totaling \$1,401;
- participated in granting himself a tax abatement in 2004 resulting in a reduction to his property tax bill of \$814; and
- participated in granting himself a statutory exemption based on age and income eligibility that could have resulted in a tax abatement of \$500.

By directing the Assessor-Appraiser to reduce his property assessment, Kulian repeatedly used his position to get an unwarranted privilege. By repeatedly participating in matters involving reductions in his property tax, Kulian participated in matters in which he also had a financial interest.

In the Matter of Paul Murphy

The Commission concluded public proceedings against former Salem Police Captain Paul R. Murphy by approving a Disposition Agreement in which Murphy admitted violating the state's conflict of interest law, G.L. c. 268A, by intervening in matters involving his daughter Patricia, also a former Salem police officer. Murphy paid a civil penalty of \$6,000.

Murphy, who was terminated as a Salem police officer in September

2003 and is appealing the termination with the Civil Service Commission, was second in command after the Chief. Patricia was first a reserve officer and then a permanent patrol officer until her termination in June 2004. She, too, is appealing the termination.

Murphy violated § 19 of the conflict of interest law in 2000 by:

- asking Lt. Mary Butler to obtain medical information that would allow Patricia to attend the police academy in summer 2000;
- communicating concerns to Lt. Butler and the Chief when Patricia was not allowed to attend the academy; and asking Lt. Butler and the Chief to make an exemption for Patricia that would allow her to attend.

Murphy also violated § 19 in 2001 by asking the Chief to defer the decision to appoint three full-time permanent officers until after Patricia attended the spring 2001 police academy in order to maintain Patricia's seniority over the another appointee, who had previously completed the academy. Finally, Murphy violated § 23(b)(2) in 2002 by obtaining confidential information about a sexual harassment complaint Patricia filed and using it in an attempt to demonstrate to the Chief that Lt. Butler, who served as the department's sexual harassment officer and reviewed Patricia's complaint, was biased against Patricia.

Litigation Update

The Executive Director, and by delegation, the Commission's attorneys, have special assistant attorney general status. This status permits attorneys to represent the Commission in court proceedings, under the oversight of the Office of the Attorney General. The Commission has recently been involved in one litigation matter.

State Ethics Commission v. Jane Doe

The Commission filed a civil action seeking to compel Jane Doe to testify

in a deposition in relation to a matter under investigation by the Commission's Enforcement Division. In response, Ms. Doe is seeking to quash the subpoena. In addition to seeking to quash the summons, Ms. Doe is seeking discovery prior to testifying.

This matter is pending in the Suffolk Superior Court. Materials in this matter are impounded.

Staff Notes

Two Northeastern University students are working as interns for six months in the Commission's Enforcement Division where they will assist in the complaint intake and investigation process.

Davin Lee, a native of San Francisco, is a junior majoring in criminal justice. Dominic DeRiso, a sociology major, is a junior from Houston, Texas.

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ation in relation to any particular matter in which the state is a party or has a direct and substantial interest. A state agency includes any board, commission, authority, other state body or instrumentality of the state.

These provisions are intended to prevent divided loyalties. As discussed below, they apply less restrictively to “special state employees.”

Can a volunteer board member appear before the board on which he or she serves on behalf of private clients?

No. A state official, even one who serves as an unpaid volunteer on an appointed board is prohibited from acting as an agent for those clients for whom he or she provides consulting services before the board on which he or she serves. For example, an Ethics Commissioner who is an attorney may not represent a client before the Ethics Commission.

A state official always may, however, represent him or herself before his or her own board. For example, the insurance commissioner may appeal an insurance surcharge. She may not, however participate as commissioner in any determination or decision regarding her appeal.

Can a volunteer board member appear before state boards other than the one on which he serves?

Yes, if the board member is designated a “special state employee.” A special state employee may act as an agent before state boards other than his own, provided that he has not officially participated in the matter, the matter is not now (and was not within the past year) within his official responsibility or the matter is pending in the state agency in which he is serving. For example, an unpaid member of an advisory board to the Department of Environmental Protection, which meets twice a week, may appear on

behalf of a client of his private law practice before the division of industrial accidents. He may not appear, however, before the Department of Environmental Protection regarding a matter involving a client.

A state official who is not a special state employee may not appear before any state boards or agencies.

What is a “special state employee”?

Some state positions are automatically designated as “special state employees” under the law. State employees are “special state employees” if:

- they do not receive compensation; or
- they are not an elected official; and
- they hold a position which allows you to work at another job during normal working hours; or
- they were not paid for more than 800 working hours (approximately 20 weeks full-time or 15 hours or less per week part-time) during the preceding 365 days. Compensation by the day is equivalent to seven hours per day.

What activities are considered “acting as agent”?

An agent is anyone who represents another person or organization in dealings with the state. Almost any instance where you are acting on behalf of someone else can be considered “acting as an agent.” For example, contacting or communicating with the state on another person’s or group’s behalf, acting as a liaison with the state on another person’s or group’s behalf; providing documents to the state on another person’s or group’s behalf; or serving as a spokesperson before the state on another person’s or group’s behalf have been considered “acting as an agent.”

When does the state have a direct and substantial interest in a

matter?

The state has a direct and substantial interest in any matter pending before, under the official jurisdiction of, or involving action by a state agency, board, commission, authority or other state body; in any effort to change state regulations, policies or procedures; any contract, court case or other legal matter in which the state is a party, or any ruling or other action by a federal, regional or state agency involving matters which are subject to regulation by the state.

Are there any exceptions to these rules for state officials who are full-time employees and thus cannot be “special state employees”?

There are a number of exemptions available to state officials including one that allows a state official to give testimony under oath, one that allows a state official to represent immediate family members and others with whom he has a fiduciary relationship in certain circumstances and one that allows a state official to hold elective or appointive office in a city, town or district with certain restrictions. For additional information, see [Advisory 94-01: State Employees Acting as Agent](#).

The law also applies in a very limited way to legislators. A legislator may not personally appear before a state agency for any compensation other than his legislative salary unless:

- the matter before the state agency is ministerial, such as filing or amending tax returns, applications for permits or licenses, incorporation papers or other documents; or
- the appearance is before a court of the commonwealth; or
- the appearance is in a quasi-judicial proceeding, such as adjudicatory proceedings or proceedings that are appealable to the courts.

There may be other exceptions that would apply to a particular situation. Please contact the Ethics Commission for advice at 617-727-0060.